IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

JAMES THOMSON and KRISTI THOMSON, Plaintiffs, vs. GUMMIWERK KRAIBURG ELASTIK, BETEILIGUNGS GmbH & Co., a German Company; GUMMIWERK KRAIBURG ELASTIK GmbH, a German company; and JOHN DOE, Defendants.	No. C02-11 LRR **ORDER**

This matter comes before the Court pursuant to the Motion for Summary Judgment (docket no. 29) filed by Defendant Gummiwerk Kraiburg Elastik Beteiligungs GmbH & Co. ("GKEB"), and the Motion to Exclude the Testimony of Plaintiffs' Expert (docket no. 33), Motion for Summary Judgment (docket no. 33), and Motion to Strike the October 2003 Opinions of Plaintiffs' Expert (docket no. 45) filed by Defendants GKEB, Gummiwerk Kraiburg Elastik GmbH ("GKE"), a German Company, and John Doe. The Court held a hearing on these Motions on November 10, 2003.

I. PROCEDURAL HISTORY

On December 4, 2001, Plaintiffs James Thomson and Kristi Thomson filed a lawsuit against Defendants in the Iowa District Court for Linn County, seeking recovery for personal injuries. Defendant GKE removed the action to this Court on January 22, 2002 on the basis that this Court has diversity subject matter jurisdiction. GKE invokes this Court's diversity jurisdiction inasmuch as complete diversity of citizenship exists between the parties and the amount in controversy exceeds $75,000.00. 28 U.S.C. § 1332.

II. STANDARD OF REVIEW

Summary judgment is appropriate only when the record, viewed in the light most favorable to the nonmoving party, shows there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Carter v. Ford Motor Co.*, 121 F.3d 1146, 1148 (8th Cir. 1997) (citing *Yowell v. Combs*, 89 F.3d 542, 544 (8th Cir. 1996)). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). A fact is material when it "might affect the outcome of the suit under the governing law." *Rouse v. Benson*, 193 F.3d 936, 939 (8th Cir. 1999). In considering a motion for summary judgment, a court must view all facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus.*, 475 U.S. at 587. Further, the court must give such party the benefit of all reasonable inferences that can be drawn from the facts. *Id*. The moving party bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show lack of a genuine issue." *Hartnagel*, 953 F.2d at 394 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the moving party has successfully carried its burden under Rule 56(c), the nonmoving party has an affirmative burden to go beyond the pleadings and by depositions, affidavits or otherwise, designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The nonmoving party must offer proof "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

III. FACTUAL BACKGROUND

To aid the Court in determining whether summary judgment is warranted, Local Rule 56.1 requires that the moving party submit a statement of material facts. The nonmoving

party must then respond to this satement in accordance with Local Rule 56.1(b). "The failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact." Local Rule 56.1(b). Plaintiffs have failed to respond to or contest the facts set forth by Defendants. The Court deems all of Defendants' facts admitted.

On December 20, 1999, Plaintiff James Thomson was employed at HiRail Corporation ("HiRail"), a rubber processing plant in Lisbon, Iowa, when he was injured at work. HiRail processes rubber and makes railroad pads for crossings. The main machine in the process is called a "press" (the "HiRail press"), which was designed by GKE, a German company. While running the HiRail press, James Thomson's hand became caught in the press. On December 4, 2001, Plaintiffs James Thomson and Kristi Thomson filed a lawsuit against Defendants in the Iowa District Court for Linn County, seeking recovery for personal injuries under theories of negligent design, negligent failure to warn, breach of implied warranty of fitness, and strict liability.

Plaintiffs designated James Meehan as their expert to provide an opinion concerning the design of the HiRail press and an alternative design. Mr. Meehan prepared two expert reports: a "preliminary" report dated November 28, 2001, and a "supplemental" report dated October 2, 2003.

A. The November 28, 2001 "Preliminary" Report

Mr. Meehan based his November 28, 2001 "preliminary" report on: (1) his inspection

of the HiRail press; (2) documents supplied by HiRail's counsel, Kevin Caster[1]; (3) conversations with Jim Thomson and B.J. Thomson; and (4) review of a sketch of the machine and accident sequence.

On July 19, 2001, Mr. Meehan spent approximately one and one-half hours at the HiRail plant. During that tour and inspection, according to Mr. Meehan, he "watched the machine operate, had the opportunity to photograph it, talked with Jim Thomson and his son, B.J. and that's about the extent of it." In his deposition, Mr. Meehan stated that he is not entirely sure whether he actually saw the machine go through a cycle or if it was just described to him. The day Mr. Meehan inspected the machine, the "molds were not set for anything but a standard gauge product." Mr. Meehan did not observe manual operation of the press. Mr. Meehan made a total of three pages of handwritten notes from the plant visit, which include notes of his conversation with Jim Thomson and B.J. Thomson. Mr. Meehan made no sketches at the time and his notes do not describe the process.

Mr. Meehan also opined concerning an alternative design. Mr. Meehan did not draw his alternative design, nor did he test it. Mr. Meehan did not consider any problems that might occur with his alternative design. Mr. Meehan's alternative design opinion was based upon his understanding of machine operators' options as described by Plaintiff Jim Thomson.

Prior to authoring his November 2001 opinion, Mr. Meehan reviewed a drawing prepared by a HiRail maintenance manager. Mr. Meehan received documents from HiRail before authoring his November 2001 opinion, however, those documents had no relevance to his opinions. Mr. Meehan did no additional work to prepare his opinion. Mr. Meehan did not know the size of the die plates used at the time of the accident, he did not see the fixtures, and he did not take measurements. Mr. Meehan did not know what the

[1]Kevin Caster is a member of the same firm as counsel for Defendants in this case.

temperatures were involved or how much pressure was being exerted against the plates. Mr. Meehan did not know how long a cycle took to complete. Mr. Meehan never saw the molds that were used to produce the product at the time of the accident. He did not know the dimensions of the product being molding. He was unsure whether there were two or four plates used in the mold.

In his preliminary report, Mr. Meehan stated that the HiRail machine was defective. Mr. Meehan's "main concern is that the side plates don't appear to be firmly held in the transfer fixture for the narrow gauge product. That's the root cause of the problem." The source of Mr. Meehan's opinion that the narrower gauge European product "caused some problem with the machine because it was not originally designed to handle that configuration of product" was Plaintiff Jim Thomson. Mr. Meehan believed that a spring broke in the press. He believed the spring was replaced after the accident. However, there was no broken spring. In his preliminary report, Mr. Meehan did not offer an opinion regarding whether there was a defective warning. There are no known prior similar accidents. No problems with the machine were identified or repaired after the accident and the accident could not be duplicated.

B. The October 2, 2003 "Supplemental" Report

In the parties' September 30, 2002 Scheduling Order, Plaintiffs represented that their expert witness was "already disclosed." On October 2, 2003, Mr. Meehan prepared a "supplemental" report outlining his opinions and mental impressions regarding the HiRail press. In his "supplemental" report, Mr. Meehan stated for the first time that there were defective safeguards and warnings. Mr. Meehan opined that ". . . it is my professional opinion that the injury was caused by deficient safeguarding of the machine. There was no warning of the hazardous condition created by the maintained air pressure in the air cylinders of the picker plate."

Plaintiffs contend that Mr. Meehan's October 2, 2003 "supplemental" report was provided once Mr. Meehan learned of the existence of additional documents[2] and had access to the depositions of HiRail employees.[3] Trial is scheduled to commence December 15, 2003.

IV. CONTENTIONS OF THE PARTIES

In their Motion to Exclude and Motion to Strike the testimony of Plaintiffs' designated expert witness, James Meehan, Defendants contend that Mr. Meehan's testimony should be excluded at trial because: (1) Mr. Meehan's "preliminary" opinion dated November 28, 2001 is inadmissible under *Daubert*; and (2) Mr. Meehan's "supplemental" opinion dated October 2, 2003 is inadmissible as untimely and because it introduces theories of liability not previously disclosed. In their Motion for Summary Judgment, Defendants contend that without expert testimony Plaintiffs cannot, as a matter of law, establish claims based on strict liability, negligent design, failure to warn, and breach of warranty. Defendants accordingly request that Plaintiffs' action be dismissed in its entirety.

V. ANALYSIS

A. Defendant GKEB's Motion for Summary Judgment

In its Motion for Summary Judgment, Defendant GKEB contends that it lacks the requisite contacts with the state of Iowa necessary for this Court to exercise personal jurisdiction over it. In their Response to GKEB's Motion, Plaintiffs state that they do not resist GKEB's Motion for Summary Judgment. The Court therefore grants GKEB's Motion

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[2] In July 2003, Defendants provided additional information to Plaintiffs.

[3] Employees of HiRail were deposed in July and August 2003.

for Summary Judgment (docket no. 29).

B. Defendants' Motion to Exclude

In their Motion to Exclude the Testimony of Plaintiffs' Expert, Defendants assert that Plaintiffs' proffered expert testimony fails to meet the admissibility requirements set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Admission of expert testimony is governed by Federal Rule of Evidence 702, which states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed.R.Evid. 702. In *Daubert*, 509 U.S. at 588, the Supreme Court held that, consistent with the "liberal thrust" of the Federal Rules of Evidence, this rule replaced the more rigid "general acceptance" test of *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir. 1923). The *Daubert* Court ruled that, consistent with Rule 702, the trial judge must ensure that any and all scientific testimony or evidence admitted is relevant and reliable before admitting it. 509 U.S. at 589. The Court continued:

> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation--i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Id. at 590.

The focus of the district court's analysis of the proffered evidence is limited solely to principles and methodology, not to the conclusions that they generate. *Id*. at 595. Any doubts regarding the admissibility of expert testimony should be resolved in favor of admission. *See Clark v. Heidrick*, 150 F.3d 912, 914 (8th Cir. 1998) (citations omitted).

See also National Bank of Commerce v. Associated Milk Producers, Inc., 191 F.3d 858, 862 (8th Cir. 1999) (citations omitted) (noting that it is not the court's role to weigh expert testimony).

"As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995) (citing *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988)). *See also* Fed.R.Evid. 703. "Only if an expert's opinion is 'so fundamentally unsupported that it can offer no assistance to the jury' must such testimony be excluded." *Id.* (citing *Loudermill*, 863 F.2d at 570).

The Court finds that Mr. Meehan's expert opinion is not so fundamentally unsupported as to warrant exclusion. Mr. Meehan's expert opinion is based on his personal inspection of the evidence and his applied knowledge acquired from training and experience. Moreover, Mr. Meehan's opinion has factual support. To the extent Defendants disagree with Mr. Meehan's basis for his conclusions or the ultimate validity of those conclusions, Defendants are, of course, free to cross-examine Mr. Meehan and present contrary evidence. The Court thus holds that Mr. Meehan's expert opinion is sufficiently reliable to be considered by the jury. Defendants' Motion to Exclude is therefore denied.

C. Defendants' Motion for Summary Judgment

Defendants contend they are entitled to judgment in their favor because without expert testimony, Plaintiffs cannot establish their claims. Since the Court has not excluded the expert testimony of Mr. Meehan, the Court finds that Plaintiffs may be able to establish their claims against Defendants. The Court therefore denies Defendants' Motion for Summary Judgment.

D. Defendants' Motion to Strike

In their Motion to Strike, Defendants contend that Mr. Meehan's October 2, 2003 expert opinion does not comply with Federal Rules of Civil Procedure 26(a)(2)(B) and 37(c). Parties must disclose the identities of expert witnesses prior to trial. Fed.R.Civ.P. 26(a)(2)(A). Under Rule 26(a)(2)(B), a testifying expert must submit a signed written report prior to trial, containing, *inter alia*, "a complete statement of all opinions to be expressed and the basis and reasons therefor" and "the data or other information considered by the witness in forming the opinions." Fed.R.Civ.P. 26(a)(2)(B). A party also has a duty to supplement disclosures, including expert reports, when additional information is made available to the party. Fed.R.Civ.P. 26(e)(1).

If a party fails to comply with the expert disclosure deadlines in Rule 26, Rule 37 provides for the imposition of sanctions. It is within the district court's discretion to exclude testimony as a sanction for failure to disclose witnesses in compliance with discovery and pretrial orders. *See Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 897-98 (8th Cir. 1978). Although a district court has authority to dismiss an action with prejudice for failure to comply with court orders or the Federal Rules of Civil Procedure, courts have concluded that dismissal with prejudice should be used sparingly because it is a drastic sanction. *Id.* at 687-88.

In this case, neither the parties or the Court set a specific date by which Plaintiffs were required to disclose expert witnesses.[4] In the September 30, 2002 Scheduling Order, Plaintiffs indicated "Already disclosed" for Plaintiffs' expert deadline. The Court notes

[4]Federal Rule of Civil Procedure 26(a)(2)(C) provides that expert witness disclosure shall be "made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date . . . ." In this case, the parties agree that Plaintiffs' expert witness and his report had been disclosed before filing of the September 30, 2002 Scheduling Order.

that Plaintiffs did not move for an extension of deadlines. Until October 2, 2003, Plaintiffs relied on the November 28, 2001 expert report, in which Mr. Meehan had only opined regarding defective design. Mr. Meehan did not state that there were defective safeguards and warnings until October 2, 2003. Defendants contend they relied on Mr. Meehan's November 28, 2001 opinion and permitting Mr. Meehan's October 2, 2003 opinion would prejudice Defendants. Specifically, Defendants argue that Plaintiffs are attempting to recreate their case and fix fatal flaws in their liability theories after Defendants expended considerable resources in preparing their defense based upon the previously disclosed opinions. The Court notes that Defendants did not request a continuance of trial based on Plaintiffs' submission of Mr. Meehan's supplemental report.

The Court finds that several factors militate against imposing the Rule 37 sanction of not permitting Plaintiffs to present their expert at trial. First, the Court finds that Defendants are partially responsible for the delay in submission of the supplemental report. Beginning in July 2001, Plaintiffs' counsel requested information from HiRail's counsel. On June 5, 2003, Plaintiffs' counsel wrote to Defendants' counsel, informing that Mr. Meehan had reviewed the opinions of Defendants' experts and that Mr. Meehan believed one of Defendants' experts, Don Wandling, has "far more information that I was ever provided by HiRail. Plaintiffs' counsel requested "every drawing and specification of the piece of equipment involved and send them to Mr. Meehan." Defendants then provided the additional information to Plaintiffs in July 2003. Second, the record is devoid of any evidence that Plaintiffs attempted to shield Mr. Meehan or his opinions from discovery. Third, the threat of prejudice to Defendants is minimized by the Court's rescheduling of the trial date.

VI. CONCLUSION

IT IS THEREFORE ORDERED THAT:

1. Defendant Gummiwerk Kraiberg Elastik Beteiligungs GmbH & Co.'s Motion for Summary Judgment (docket no. 29) is GRANTED.

2. Defendant Gummiwerk Kraiberg Elastik Beteiligungs GmbH & Co. is DISMISSED with prejudice from the above-entitled matter.

3. The Clerk of Court shall amend the caption to reflect the removal of Defendant Gummiwerk Kraiberg Elastik Beteiligungs GmbH & Co., a German Company, as a party to this case.

4. Defendants' Motion to Exclude (docket no. 33) is DENIED.

5. Defendants' Motion to Strike (docket no. 45) is DENIED.

6. Defendants' Motion for Summary Judgment (docket no. 33) is DENIED.

7. The trial date and final pretrial conference shall be rescheduled from December 4, 2003 and December 15, 2003, respectively. The attorneys shall advise the Court within 14 days what months they are available for trial the last two weeks of the month.

IT IS SO ORDERED this 13th day of November, 2003.

LINDA R. READE
JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA